No. 75-554

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK S. BEAL, ET AL., PETITIONERS

v.

ANN DOE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

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This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

QUESTION PRESENTED

The United States will discuss the following question:

Whether Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, or the Equal Protection Clause of the Fourteenth Amendment requires states that participate in the Medical Assistance Program ("medicaid") to pay for abortions that are not medically indicated.

STATEMENT

Respondents are women who are eligible for assistance under the medicaid plan established by the Commonwealth of Pennsylvania and funded by the United States under Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.* During their pregnancies, respondents requested medicaid coverage for abortions. These requests were denied: Pennsylvania's medicaid plan limits financial assistance for abortions to those operations that are certified by physicians as necessary for the health of the woman or to prevent the birth of an infant with an incapacitating deformity or mental deficiency,[1] and respondents did not furnish the required certifications.

Respondents then instituted this suit for declaratory and injunctive relief in the United States District

[1] The Pennsylvania medicaid plan covers abortions in the following circumstances (Pet. App. 2a–3a, 63a–64a):

"1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;

"2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or

"3. There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;

"4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

"5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Apparently the plan covers the cost of a preliminary examination by physicians to determine whether a patient is eligible under these requirements (Pet. App. 43a, n. 2).

Court for the Western District of Pennsylvania. They contended that the State's requirement of a certification of medical necessity before an abortion would be funded was in conflict with Title XIX of the Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. A three-judge district court was convened pursuant to 28 U.S.C. 2281.

The district court concluded that Pennsylvania's limitation of coverage to abortions that are medically necessary did not contravene Title XIX. The court held, however, that the state restriction, as applied during the first trimester of pregnancy, does deny equal protection since it creates "an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion" (Pet. App. 39a; 376 F. Supp. 173, 191). The court granted a declaratory judgment that the abortion reimbursement provisions, as applied during the first 12 weeks of pregnancy, were unconstitutional (Pet. App. 50a–51a).

Petitioners appealed to the court of appeals from the award of declaratory relief; respondents cross-appealed from the denial of declaratory relief with respect to the second and third trimesters of pregnancy.[2] The court of appeals *en banc*, with three judges dissenting, held that Title XIX prohibits a participating state from requiring a physician's certi-

[2] Since respondents did not contest the denial of injunctive relief, the court of appeals had jurisdiction. See *Gerstein* v. *Coe*, 417 U.S. 279.

fication of medical necessity as a condition for funding during both the first and second trimesters of pregnancy (Pet. App. 83a–84a; 523 F. 2d 611, 621–622). In light of this disposition, the court found it unnecessary to address the constitutional question raised by respondents.

DISCUSSION

Title XIX of the Social Security Act establishes a Medical Assistance Program pursuant to which the states may provide federally-funded medical aid to the "categorically" and "medically" needy. As a prerequisite to federal funding under Title XIX, a state medicaid plan must provide financial assistance to the categorically needy[3] with regard to five general categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facility services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. (Supp. IV) 1396a (a)(13)(B) and 1396d(a)(1)–(5).[4]

[3] The "categorically" needy includes needy families with dependent children and the aged, blind, and disabled. 42 U.S.C. (Supp. IV) 1396a(a)(10(A). The "medically" needy includes other needy individuals. 42 U.S.C. (Supp. IV) 1396a(a)(10)(C). See 45 C.F.R. 249.10(a)(1). Although the states need not extend medicaid coverage to the medically needy, Pennsylvania has chosen to provide the same benefits to all needy persons (Pet. App. 70a, n. 11).

[4] Other benefits may be offered at the state's option, subject to the requirements that they be provided "with reasonable promptness to all eligible individuals" (42 U.S.C. 1396a(a)(8)) and be made available on the same basis to all eligible individuals (42 U.S.C. (Supp. IV) 1396a(a)(10(B)).

The states are not required, however, to provide payment for every medical treatment falling within those five general categories. All the Act requires is that the state medicaid plan establish "reasonable standards * * * for determining * * * the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX]." 42 U.S.C. (Supp. IV) 1396a(a)(17). In our view, a state's determination to offer medicaid coverage for abortions only when such treatment is medically indicated[5] is reasonable and is neither inconsistent with the objectives of Title XIX nor in violation of the Fourteenth Amendment.

1. The principal objective of Title XIX is the furnishing of "medical assistance on behalf of [certain families and individuals] whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. (Supp. IV) 1396. No provision of

[5] We use the term "medically indicated" to refer to medical treatments determined by the attending physician to be "necessary for the preservation of the patient's health," as this Court has construed like phrases in *United States* v. *Vuitch*, 402 U.S. 62, and *Doe* v. *Bolton*, 410 U.S. 179. In *Vuitch*, the Court determined that "'health' * * * includes psychological as well as physical well-being" (402 U.S. at 72). And in *Bolton*, the Court concluded (410 U.S. at 192): "Whether * * * 'an abortion is necessary' is a professional judgment that * * * may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Although the record does not reflect how the Pennsylvania scheme operates in practice, we assume that the requirement that there be "evidence that continuance of the pregnancy may threaten the health or life of the mother" (see note 1, *supra*) is the same as a requirement that the abortion be medically indicated.

which a physician has determined that the treatment is required for the patient's physical or emotional well-being therefore accords with the congressional intent and falls within the discretion granted the states under Title XIX.

It is true that the practical and emotional consequences of a failure to perform an abortion may be profound. However, the same may be said of the failure to perform medically feasible cosmetic surgery, yet a state presumably could reasonably determine not to cover the costs of such operations when they are not medically indicated. Furthermore, the experience of an abortion could have far-reaching and unforeseen consequences for the expectant mother's psychological health, and there would thus be special reasons for requiring the exercise of medical judgment before the state undertakes to provide a woman with a requested abortion.

The state's requirement of such an exercise of medical judgment is not so lacking in rationality as to be "unreasonable" for purposes of 42 U.S.C. (Supp. IV) 1396a(a)(17). Certainly a state is not required by Title XIX to provide financial assistance with respect to an abortion, or any other operation, merely upon the patient's own request.

a. In reaching the opposite conclusion, the court of appeals apparently reasoned that since Pennsylvania "has determined, in its discretion, that pregnancy is a condition for which medical treatment is 'necessary' " (Pet. App. 83a), any medically feasible treat-

the Social Security Act explicitly requires the states to pay the costs of abortions or of any other particular medical procedure. To the contrary, the language and legislative history of Title XIX indicate that Congress intended that the participating states would retain substantial flexibility in determining the extent, scope, and duration of medicaid coverage, subject only to the requirement of reasonableness and the other specific requirements of the Act. As the court of appeals observed (Pet. App. 79a):

> Congress has no present intention of funding every procedure which falls within the legal practice of medicine. The states are given broad discretion to tailor their programs to their particular needs, and are required to economize and to fund only necessary medical expenses.

Accordingly, a state may properly restrict the coverage of its medicaid plan to the costs of necessary medical services. In particular, we consider it reasonable for a state to insist that the decision to have an abortion be informed by expert medical judgment (see *Roe* v. *Wade,* 410 U.S. 113, 164), and to limit funding to those abortions determined by a physician to be medically indicated. Such restricted coverage is consistent with the legislative objectives of "meet[ing] the costs of necessary medical services" (42 U.S.C. (Supp. IV) 1396; emphasis added) and "safeguard-[ing] against unnecessary utilization of * * * care and services." 42 U.S.C. (Supp. IV) 1396a(a)(30). See also 45 C.F.R. 250.18–250.20. The limitation of a medicaid plan's coverage of abortions to situations in

ment of that condition must be covered by the state's medicaid plan. But even if the state is barred from intruding upon the choice of treatment, it may legitimately insist that that treatment be the product of a medical determination.

The court of appeals believed that the Pennsylvania regulations in fact interfere with the exercise of medical judgment (*ibid.*), but this appears to be a misperception of the state's eligibility requirements for financial aid for abortions. With a possible exception noted in the next paragraph, Pennsylvania expressly allows reimbursement of the costs of any abortion that has been determined by the attending physician to be medically indicated. See notes 1 and 5, *supra*.

b. The Pennsylvania medicaid plan has a feature, however, that was not discussed by the court of appeals but which may conflict with the Act. Pennsylvania apparently will not reimburse the costs of abortions that have been certified by the attending physician as necessary unless two additional physicians of "recognized professional competency" have examined the patient and have concurred in writing. See note 1, *supra*. Depending upon the interpretation of the state's regulations and their practical operation, this requirement may improperly intrude on the medical judgment of the attending physician in a manner contrary to what we believe to have been the intendment of Congress.

The record is unclear, however, whether medicaid funding in Pennsylvania ever has been denied for an abortion certified by the attending physician to be

medically necessary because of the lack of concurrence of two additional physicians, and whether the role of the two additional physicians has been defined to require an independent determination of medical necessity or is limited to a diagnosis of whether the abortion would unduly endanger the woman's health. If this Court sustains Pennsylvania's requirement of a certification by the attending physician, the case may appropriately be remanded for consideration of the further requirement that two other physicians concur in the attending physician's judgment.

2. Pennsylvania's limitation of medicaid assistance to abortions that are medically indicated does not violate the Equal Protection Clause of the Fourteenth Amendment.[6] For the reasons discussed above, that limitation satisfies the statutory requirement of reasonableness. By the same token, therefore, it also satisfies the rational basis test for equal protection. See, *e.g.*, *Jefferson* v. *Hackney*, 406 U.S. 535, 546; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Dandridge* v. *Williams*, 397 U.S. 471, 486–487.

Respondents contend, however, that the limitation invidiously discriminates between "those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion" (Br. in Opp. 6) and thus can be justified, if at all, only if it promotes "a compelling state interest" (*ibid.*). But the distinction Pennsylvania draws between abortion and

[6] For the reasons stated in the immediately preceding paragraph in the text, we do not here discuss whether Pennsylvania's further requirement of concurrence by two additional physicians is constitutional.

childbirth, by requiring a certification by the attending physician in the former case and not in the latter,[7] is not invidious; it merely reflects the fact that whereas medical treatment at childbirth is generally considered to be necessary, in some circumstances a physician might determine that an abortion would not be an appropriate medical treatment.

Presumably it was for this reason that this Court, in recognizing a qualified right to abortion, emphasized the critical importance of the attending physician's role by holding that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe* v. *Wade, supra,* 410 U.S. at 164. See also *Doe* v. *Bolton, supra,* 410 U.S. at 192. Thus, Pennsylvania has acted responsibly as well as constitutionally by interposing a physician between the medicaid patient and the decision to abort.

Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a "right" to undergo many recognized medical procedures by a licensed physician, but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures.

[7] Respondents incorrectly assert that Pennsylvania provides medicaid assistance "only to women who continue their pregnancies to childbirth" (Br. in Opp. 7). In fact, as we have noted above (p. 8, *supra*), the Pennsylvania medicaid plan covers the costs of abortions as well as of childbirths so long as the treatment provided satisfies the touchstone of medical necessity.

3. Because of the conflicting decisions of the lower courts and the substantial importance of the questions presented here to the federal government's oversight responsibilities under Title XIX,[8] we believe that those questions warrant review by this Court. The Second and Sixth Circuits have held that Title XIX permits state medicaid plans to deny coverage of abortions that are not medically necessary. *Roe* v. *Norton,* 522 F. 2d 928, 935 (C.A. 2); *Roe* v. *Ferguson,* 515 F. 2d 279, 283 (C.A. 6). See also *Doe* v. *Rose,* 499 F. 2d 1112 (C.A. 10). These decisions conflict with the decision below on the statutory question petitioners raise.

Respondents contend, in opposing review, that "in cases in which federal courts have reached the constitutional claim, they, without exception, find such restrictions to be invalid on constitutional grounds" (Br. in Opp. 9).[9] But that is not a basis for denying review in these circumstances. To the contrary, since one of the constitutional decisions upon which respondents rely, *Doe* v. *Westby,* 402 F. Supp. 140 (D. S.D.), appeal docketed December 8, 1975, No. 75-813, is now before this Court on direct appeal, considera-

[8] The Secretary must approve any state medicaid plan that meets the requirements of the Act and is required to disapprove any plan that fails to satisfy those requirements. 42 U.S.C. 1396a(b). Furthermore, the Secretary is responsible for enforcing compliance with the mandatory terms of the Act and may terminate federal funding to any state that is found, after opportunity for hearing, to be in substantial violation of any provision. 42 U.S.C. 1396c.

[9] The courts of appeals in *Norton* and *Ferguson* remanded those cases to the district courts for consideration of the constitutional issue.

tion of at least the statutory issue presented in the petition appears to be unavoidable.

CONCLUSION

For the foregoing reasons, the United States is of the view that neither Title XIX of the Social Security Act nor the Fourteenth Amendment requires a federally-funded state medicaid program to pay for abortions that are not medically indicated.[10]

Respectfully submitted.

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[10] Since both the statutory and constitutional issues are present in *Westby*, and since the Pennsylvania medicaid plan requires concurrence in the attending physician's judgment by two other physicians—a factor that may, as we have noted (see pp. 8–9, *supra*), complicate the statutory analysis—the Court may deem it appropriate to hold this case pending disposition of *Westby*.

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